

## Internal Revenue Service

Department of the Treasury  
Washington, DC 20224

Number: **200916002**

Release Date: 4/17/2009

Index Number: 9100.00-00, 2642.00-00,  
2652.00-00

Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:PSI:B04 – PLR-123285-08

Date:

November 12, 2008

### Legend:

Decedent =  
Spouse =  
Law Firm =  
Year 1 =  
Year 2 =  
State Statute =

Dear \_\_\_\_\_ :

This is in response to a letter dated May 15, 2008, from your authorized representative, requesting an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to sever a trust pursuant to § 26.2654-1(b)(1) of the Generation-Skipping Transfer Tax Regulations and make an election under § 2652(a)(3) of the Internal Revenue Code.

### Facts

Decedent died in Year 1, survived by Spouse and two children. Decedent bequeathed the residue of his estate to a trust (Trust) for the benefit of Spouse. Estate hired Law Firm to assist in the administration of the estate and prepare the Form 706 (United States Estate (and Generation-Skipping Transfer) Tax Return). A qualified terminable interest property (QTIP) election under § 2056(b)(7) was made with respect to the property in Trust. In an affidavit, Law Firm stated that they inadvertently failed to advise the estate that Trust should be severed into a GST exempt QTIP trust and a GST nonexempt QTIP trust and that a reverse QTIP election under § 2652(a)(3) should be

made with respect to the exempt trust. Upon the death of Spouse in Year 2, it was discovered that Trust was not severed and a reverse QTIP election was not made.

The trust instrument does not provide for the severance of Trust. However, State Statute authorizes an executor or a trustee to establish two or more separate trusts without prior court approval or the consent of the persons interested for the purpose of segregating the property held in trust which would be excepted, excluded or exempt from GST tax from such property which is not so excepted, so that one or more of such separate trusts will have an inclusion ratio of zero.

To date, there have been no taxable distributions from Trust.

### Law and Analysis

Section 2001(a) imposes a tax on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States.

Section 2056(a) provides that, for purposes of the tax imposed by § 2001, the value of the taxable estate is to be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property that passes or has passed from the decedent to the surviving spouse.

Section 2056(b)(1) provides that no deduction shall be allowed for an interest passing to the surviving spouse if, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, the interest will terminate or fail and (A) an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than the surviving spouse (or the estate of such spouse); and (B) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse.

Section 2056(b)(7)(A) provides that, in the case of QTIP, the property shall be treated as passing to the surviving spouse for purposes of § 2056(a), and no part of the property shall be treated as passing to any person other than the surviving spouse for purposes of § 2056(b)(1)(A).

Section 2056(b)(7)(B)(i) defines "qualified terminable interest property" (QTIP) as property: (1) which passes from the decedent; (2) in which the surviving spouse has a qualifying income interest for life; and (3) to which an election under § 2056(b)(7)(B)(v) applies.

Section 2056(b)(7)(B)(v) provides that an election under § 2056(b)(7) with respect to any property shall be made by the executor on the return of tax imposed by § 2001. The election, once made, is irrevocable.

Under § 2044, any property in which the decedent had a qualifying income interest for life and for which a deduction was allowed under § 2056(b)(7) is includable in the decedent's gross estate.

Section 2601 imposes a tax on every generation-skipping transfer.

Section 2631(a) provides that, for purposes of determining the GST tax, every individual shall be allowed a GST exemption of \$1,000,000 (adjusted for inflation under § 2631(c)) that may be allocated by such individual (or his executor) to any property with respect to which such individual is the transferor. Section 2631(b) provides that once an allocation of GST exemption is made, it is irrevocable.

Under § 2632(a), any allocation by an individual of his GST exemption may be made at any time on or before the date prescribed for filing the individual's estate tax return (including extensions).

Section 2632(e)(1) provides that any portion of an individual's GST exemption which has not been allocated within the time prescribed by § 2632(a) shall be deemed to be allocated as follows - (A) first, to property which is the subject of a direct skip occurring at the individual's death, and (B) second, to trusts with respect to which the individual is the transferor and from which a taxable distribution or a taxable termination might occur at or after the individual's death.

Section 2652(a)(3) provides that in the case of any trust with respect to which a deduction is allowed to the decedent under § 2056(b)(7), the estate of the decedent may elect to treat all of the property in the trust, for purposes of the GST tax, as if the QTIP election had not been made. This election is referred to as the "reverse QTIP election." The consequence of a reverse QTIP election is that the decedent remains, for GST tax purposes, the transferor of the QTIP trust for which the election is made. As a result, the decedent's GST exemption may be allocated to the QTIP trust.

Section 26.2652-2(b) provides that the reverse QTIP election is to be made on the return on which the QTIP election is made.

Section 26.2654-1(b)(1)(ii) provides that the severance of a trust that is included in the transferor's gross estate (or created under the transferor's will) into two or more trusts is recognized for purposes of chapter 13 if the governing instrument does not require or otherwise direct severance but the trust is severed pursuant to discretionary authority granted either under the governing instrument or under local law; and

(A) The terms of the new trusts provide in the aggregate for the same succession of interests and beneficiaries as are provided in the original trust;

(B) The severance occurs (or a reformation proceeding, if required, is commenced) prior

to the date prescribed for filing the federal estate tax return (including extensions actually granted) for the estate of the transferor; and

(C) Either -

(1) The new trusts are severed on a fractional basis. If severed on a fractional basis, the separate trusts need not be funded with a pro rata portion of each asset held by the undivided trust. The trusts may be funded on a nonpro rata basis provided funding is based on either the fair market value of the assets on the date of funding or in a manner that fairly reflects the net appreciation or depreciation in the value of the assets measured from the valuation date to the date of funding; or

(2) If the severance is required (by the terms of the governing instrument) to be made on the basis of a pecuniary amount, the pecuniary payment is satisfied in a manner that would meet the requirements of § 26.2654-1(a)(1)(ii) if it were paid to an individual.

Under § 301.9100-1(c), the Commissioner may grant a reasonable extension of time under the rules set forth in §§ 301.9100-2 and 301.9100-3 to make a regulatory election, or a statutory election (but no more than 6 months except in the case of a taxpayer who is abroad), under all subtitles of the Code except subtitles E, G, H, and I.

Sections 301.9100-1 through 301.9100-3 provide standards the Commissioner will use to determine whether to grant an extension of time to make a regulatory election.

Section 301.9100-3(a) provides that requests for extensions of time for regulatory elections that do not meet the requirements of § 301.9100-2 must be made under the rules of § 301.9100-3. Requests for relief subject to § 301.9100-3 will be granted when the taxpayer provides the evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the Government.

Section 301.9100-3 (b)(1)(v) provides that a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, the election.

In this case, as a result of the QTIP election made on the Form 706, Trust's assets are includible in Spouse's gross estate pursuant to § 2044. Accordingly, Spouse is the transferor of Trust's assets for GST tax purposes. Therefore, Decedent's GST exemption cannot be allocated to Trust's assets. However, if Trust is severed into two trusts, a GST exempt trust and a GST nonexempt trust, pursuant to § 26.2654-1(b)(1), and a reverse QTIP election under § 2652(a)(3) is made with respect to the GST exempt trust, Decedent will be treated as the transferor of the GST exempt trust's assets, and Decedent's GST exemption may be allocated to the GST exempt trust. It has been represented that Decedent has sufficient GST exemption to allocate to the

GST exempt trust.

Based on the facts submitted and the representations made, we conclude that the requirements of § 301.9100-3 have been satisfied. Accordingly, the estate is granted sixty (60) days from the date of this letter to sever Trust into a GST exempt trust and a GST nonexempt trust and to file a supplemental Form 706 on which the reverse QTIP election is to be made for the GST exempt trust and Decedent's GST exemption is to be allocated to the GST exempt trust. The supplemental Form 706 should be filed with the Internal Revenue Service Center, Cincinnati, Ohio 45999. A copy of this letter should be attached to the return.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. Specifically, no opinion is expressed or implied regarding whether Trust qualifies as a QTIP Trust under § 2056(b)(7).

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Sincerely,

Curt G. Wilson  
Deputy Associate Chief Counsel  
(Passthroughs and Special Industries)

Enclosure

Copy for § 6110 purposes  
Copy of this letter

cc: